Pactiv Corporation d/b/a Tenneco Packaging, Inc. ***and*** **International Union of Operating Engineers, Local 470, AFL–CIO.** Cases 11–CA–18425 and 11–CA–18442

July 29, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On June 9, 2000, Administrative Law Judge George Carson II issued the attached decision. The General Counsel, the Respondent, and the Charging Party each filed exceptions and a supporting brief, and the Respondent and the Charging Party filed answering briefs and replies.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

The judge found that the Respondent did not violate Section 8(a)(3) and (1) of the Act by contacting the local sheriff on July 29, 1999, about employee Gary McClain, who reportedly had been engaging in threatening behavior. The judge found that the General Counsel failed to show that McClain's union activity was a motivating factor in the Respondent's decision to take that action. The judge further found that the Respondent established that it would have taken the same action even in the absence of McClain's union activity. The judge also found that the Respondent did not violate Section 8(a)(3) and (1) by conditioning McClain's reinstatement upon his submitting to an exam by a company-designated psychiatrist. The judge found that this condition was consistent with its preexisting short-term disability policy and past practice. We adopt the judge's findings and dismiss the complaint.

In response to the points made by our concurring colleague, we wish to emphasize certain points that, in our view, are critical in assessing cases like the instant one.

Our colleague finds several troubling aspects to the case. She says:

> First, McClain had a history of exhibiting disturbing behavior, yet the Respondent, while concerned, had not previously taken any action. Second, the Respondent's concern over McClain's reported behavior intensified shortly after the commencement of the organizing campaign in early July 1999. . . Third, the Respondent saw a connection between the ongoing organizing campaign and McClain's disturbing behavior relying on a psychiatrist's advice that union organizing campaigns are stressful.

We agree that union campaigns can be stressful events in the workplace, and this may exacerbate preexisting behavioral problems of particular employees. In the instant case, employee McClain's conduct demonstrated such problems even before the union campaign. However, these problems had not reached the point where the Employer thought that outside assistance was necessary. It may well be that the union campaign was the event that pushed McClain's problems "over the edge," such that outside assistance (calling police and seeking a psychiatric opinion) was required. In this sense, it may be that, but for the union campaign, outside assistance would not have been required. But, surely, the fact that a union campaign is the event which pushes a problem "over the edge" is not a reason to prohibit an employer from relying on the employee's genuinely threatening behavior as a basis for seeking assistance to deal with the problem (as opposed to taking action simply to discourage the employee's vigorous, but protected, prounion activity). Similarly, the fact that an employer has not previously sought assistance is not itself a basis to condemn the seeking of assistance.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. July 29, 2002

Peter J. Hurtgen, Chairman

William B. Cowen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Respondent, the General Counsel, and the Charging Party each have effectively excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find it unnecessary to consider the judge's discussion of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983) (ongoing lawsuit will violate Sec. 8(a)(1) if it lacks a reasonable basis in law and fact and has a retaliatory motive). See *BE & K Construction Co. v. NLRB*, 122 S. Ct. 2390 (2002). Although the General Counsel did not present this case under a *Bill Johnson's* theory (and the Charging Party specifically contests its applicability), the Respondent raised it as a defensive argument in a pretrial motion to stay or postpone the hearing pending the outcome of Gary McClain's appeal of his involuntary commitment. The judge denied the motion, and the Board denied the Respondent's request for special permission to appeal.

The General Counsel has not proven that the Respondent's conduct was unlawfully motivated, and the record amply demonstrates that the Respondent had a legitimate concern regarding McClain's mental state and the potential for workplace violence. In these circumstances, the Respondent's conduct did not violate the Act.

MEMBER LIEBMAN, concurring.

This case illustrates the possible tension between the free exercise of employees' right to organize and the legitimate need of employers to guard against potential workplace violence. The Respondent requested a county sheriff to provide security for a meeting with a prounion activist, Gary McClain, who, according to employee reports, had been exhibiting unusual and threatening behavior before and during a union organizing campaign. This request, in turn, triggered a chain of events that led to McClain's arrest and involuntary commitment to a mental health facility. The Respondent's conduct, and its subsequent demand that McClain submit to an exam by a company-retained psychiatrist prior to returning to work, are alleged to violate Section 8(a)(3) and (1) of the Act.

After careful consideration, I join my colleagues in adopting the judge's recommendation to dismiss the complaint. I write separately, however, to emphasize the need for care in analyzing cases such as this one. Workplace violence is a serious problem. But as a justification for employer actions that may infringe employees' rights under the Act, the need to protect employees from the threat of violence is not fundamentally different from other, recognized managerial interests. As in this case, it may be a legitimate rationale. In other cases, it may simply offer a plausible pretext for antiunion measures. Accordingly, the Board must examine each case on its own merits.

I. THE JUDGE'S FINDINGS

The judge found that McClain engaged in union activity, that the Respondent was aware of his union activity, and that the Respondent was hostile to his union activity. The judge found, however, that McClain's union activity was not a motivating factor in the Respondent's decision to contact the sheriff's office about him. The judge further found that the Respondent established that it would have taken the same action even in the absence of McClain's union activity. Finally, the judge found no violation in the Respondent's demand that McClain submit to a return-to-work exam by a company-retained psychiatrist.

II. DISCUSSION

As discussed below, I concur with my colleagues in dismissing the complaint, but there are nonetheless several troubling aspects to this case. First, McClain had a history of exhibiting disturbing behavior, yet the Respondent, while concerned, had not previously taken any action. Second, the Respondent's concern over McClain's reported behavior intensified shortly after the commencement of the organizing campaign in early July 1999.[1] Certainly, absent a credible explanation, this timing might warrant an inference of unlawful motivation. See *Donald Sullivan & Sons, LLC*, 333 NLRB No. 7, JD slip op. at 5 (2001). Third, the Respondent saw a connection between the ongoing organizing campaign and McClain's disturbing behavior, relying on a psychiatrist's advice that union organizing campaigns are stressful. Union organizing campaigns *can* be stressful, in part because of the intense employer opposition (including unfair labor practices) they sometimes engender. But it is certainly possible that an employer who strongly opposes union organizing efforts, even lawfully, will perceive a potential for violence when there is none, or will encourage employees and supervisors mistakenly to regard union supporters as dangerous. See *K-Mart Corp.*, 336 NLRB No. 37, slip op. at 1 (2001) (employer unlawfully instructed employees to report harassment by union supporters). Accord *Publishers Printing Co.*, 317 NLRB 933, 934 (1995) (employer unlawfully told employees to report "any sort of pressure to join" union), enfd. mem. 106 F.3d 401 (6th Cir. 1996).

It is therefore critical that the Board be alert to the possibility that an employee's allegedly threatening behavior actually may be no more than vigorous, but noncoercive, protected concerted activity. The Board has long recognized that union and other protected activity often "engender[s] ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 132 (1986). Those ill feelings and strong responses can be stressful for employees, and that stress may manifest itself in an employee's behavior. In the usual case, however, the employee's stress-induced behavior, sometimes referred to as part of the "res gestae" of union activity, remains protected by the Act and may not serve as the basis for adverse action. Id.

Employers justifiably are more concerned today than ever about workplace violence and they must remain free to quickly address genuine threats. The Board's sound policy is not to second-guess well-intended employer efforts to provide a safe workplace. But the Board is nevertheless bound to enforce the Act and may not excuse seemingly legitimate action when it is based on illegitimate considerations. See *Sure-Tan, Inc.*, 467 U.S. 883, 895–896 fn. 6 (1984). The Board therefore must not permit heightened sensitivities to the risk of workplace violence to inhibit its vigilant enforcement of the Act.

With these considerations in mind, however, I conclude in this case that the Respondent's conduct was not unlawfully motivated. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To begin, it is apparent that the Respondent had cause, predating the organizing campaign, to be watchful of McClain. Indeed, the Respondent actually turned its attention to McClain in early 1999—almost 6 months *before* the onset of the union organizing campaign—because of McClain's known difficulties working with others. The Respondent believed McClain, who worked alone at the time, might not

[1] All dates are 1999, unless stated otherwise.

deal well with a planned reorganization that would require him to work alongside other employees. As the judge found, the Respondent's fears were confirmed when it began receiving employee reports about McClain's behavior as the reorganization approached. Among those reports was McClain's admission to Human Resources Assistant Taylor that he slept with loaded guns at his bedsides to fend off alleged saboteurs. The Respondent also learned from Supervisors Boynton and Wonoski that they had personally observed McClain exhibit disturbing behavior. These concerns led to the call to the sheriff's office on July 29.

As stated, the timing of the Respondent's call to the sheriff is troubling, given that the Respondent's concern over McClain's reported behavior intensified shortly after the organizing campaign commenced in early July. But, the fact is that the maintenance reorganization commenced in early July, as well, and the Respondent had already articulated its fear of how McClain would react. And, again, those fears were confirmed by reports from supervisors and employees alike.

Also significant in regard to timing is the scheduling of the July 29 conference call, which led to the Respondent's contact with the sheriff. The call was originally scheduled for August 3, so various members of management and the company doctor could discuss McClain's behavior. The judge found that the call was moved to July 29, *after* McClain spoke in favor of the Union at a captive audience meeting on the morning of July 28. In fact, the record shows that the Respondent decided to advance the call *before* the captive audience meeting, which actually occurred on the evening of July 28. The actual sequence of these events further supports the judge's finding that neither the conference call nor the contact with the sheriff was in response to McClain's support for the Union.

The judge also made certain findings about the July 29 conference call that support his decision: (1) the call was simply an information-gathering session to help the Respondent assess what reasonably appeared to be a potential workplace violence problem; (2) although the call participants mentioned McClain's union activity as a potential stress factor, they made no personnel decisions based on this activity; and (3) the Respondent decided only to seek additional information from McClain's private physician and to ask the sheriff to provide additional security for a meeting with McClain. Importantly, the record reflects that the Respondent was unaware at the time of the outstanding warrant for McClain's arrest. And, even though the Respondent later learned of the warrant, the judge specifically credited the sheriff's deputy, Major Jody Rowland, that the Respondent had no involvement with his decision to execute that warrant.

On balance, therefore, I cannot disagree with the judge that the General Counsel failed to establish that McClain's union activity was a motivating factor in the Respondent's decision to contact the sheriff, or, alternatively, that the Respondent established that it would have taken the same action even in the absence of McClain's union activity.

Further, I find in agreement with my colleagues and the judge that there is insufficient evidence that the Respondent violated the Act by demanding that McClain undergo a return-to-work exam by a company-designated psychiatrist. As the judge found, the Respondent showed this demand was consistent with its short-term disability policy and its past practice.

Dated, Washington, D.C. July 29, 2002

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Donald R. Gattlaro, Esq., for the General Counsel.
Harold R. Weinrich and *Jonathan J. Spitz, Esqs.*, for the Respondent.
Helen L. Morgan, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Aiken, South Carolina, on March 27 through 30, 2000. The charge in Case 11–CA–18425 was filed on August 11, 1999, and was amended on January 27 and 31, 2000. The charge in Case 11–CA–18442 was filed on August 26, 1999, and was amended on January 27 and 31, 2000. The amended consolidated complaint issued on February 11, 2000.[1] The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act by causing local law enforcement authorities to detain employee Gary McClain on July 29 because of his union activities and by failing and refusing to reinstate him on July 29. McClain was not terminated. The complaint further alleges that Respondent has violated Section 8(a)(1) and (3) of the Act by conditioning his reinstatement upon his undergoing a psychiatric examination by a psychiatrist of Respondent's choosing. Respondent's answer denies any violation of the Act.

In view of various references during the course of the hearing to other judicial and administrative forums, I find it appropriate to make clear that this decision relates only to whether Respondent violated the National Labor Relations Act. In deciding that issue, my decision sets out evidence, including reports relating to alleged discriminatee Gary McClain. My recitation of those reports is relevant only to my evaluation of the actions of Respondent. Since the record contains no expert medical testimony, I have no basis for, and have not made, any finding regarding the mental status of McClain. My decision, based solely on the record before me, relates only to whether Respondent violated the Act. I find that it did not.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

[1] All dates are in 1999 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Pactiv Corporation d/b/a Tenneco Packaging, Inc., a Delaware corporation, is engaged in the manufacture and nonretail sale of plastic products at its facility in Beech Island, South Carolina, at which it annually purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the State of South Carolina. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Union of Operating Engineers, Local 470, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

A. Preliminary Observations and Procedural Matters

McClain was detained by law enforcement authorities on July 29. General Counsel and the Charging Party contend that Respondent unlawfully targeted McClain and mischaracterized his behavior in reports to law enforcement authorities in order to remove an outspoken union proponent from the plant. Respondent argues that it evaluated various reports of behavior exhibited by McClain, formed a good-faith belief that McClain could pose a potential risk to safety in the plant, and alerted local authorities to its concerns. Respondent denies requesting that authorities take any action against McClain and denies causing his detention.

Respondent subpoenaed McClain's medical records and treating mental health professionals in order to present expert medical testimony regarding McClain's mental condition. What those records and testimony would have shown is unknown. There is no expert medical testimony in this record relating to McClain's mental condition because General Counsel, Charging Party, and McClain's private attorney invoked the privilege recognized in the case of *Jaffee v. Redmon*, 518 U.S. 1 (1996). In *Jaffee*, the Court held that there is an absolute privilege with regard to confidential conversations between a patient and psychotherapist. The opinion does not discuss whether disclosure of a diagnosis would also be privileged; however, any diagnosis following an evaluation in which the patient verbally communicated with the psychotherapist would, of necessity, reflect the psychotherapist's expert evaluation of such communications.[3] In view of the invocation of the privilege, I granted the petitions to revoke the subpoenas served by Respondent. In the absence of expert medical testimony, I have resolved the question of whether Respondent acted in good faith or out of animus towards union organizational efforts on the basis of the factual record before me. That record includes testimonial evidence relating to McClain's behavior, evidence establishing an emergency involuntary admission of McClain to the Charter Rivers Behavioral Health Systems facility located in Lee County, South Carolina, and an Order of a Probate Court finding, inter alia, that McClain was mentally ill and that there "is a likelihood of serious harm to himself or others." McClain is appealing his involuntary commitment and the Order of the Probate Court.

Respondent, both prior to and at the hearing, moved to postpone the hearing pending the outcome of McClain's appeal of his commitment, citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and arguing that, if the appeal is denied, the alleged unfair labor practice arising out of McClain's detention must be dismissed. In the instant case, it is not true as a matter of law that the state court action would be dispositive of the unfair labor practice. On July 29, McClain's psychological condition was not evaluated until after he was detained by law enforcement authorities. Assuming the validity of McClain's commitment at that time, if it were established that his mental condition resulted from the trauma of the detention, rather than a preexisting mental state, the state court action would not be dispositive and Respondent's *Bill Johnson's* argument would fail. See *Freeman Decorating Co.*, 288 NLRB 1235 (1988), in which physical injuries were inflicted on the discriminatee following his protected activity. I reaffirm my denial of Respondent's motion to postpone the hearing.

General Counsel established the element of animus through evidence that, in mid-July, Respondent interfered with leafleting by union officials. In mid-July, Union Business Agent Russell Britt and organizer Johnny Lambert were passing out union leaflets on the access road to the plant. A plant guard informed them that they were trespassing; they asserted that they were not. Britt observed the guard return to the guard shack and confer with two unidentified persons from the plant. About 20 minutes later, a deputy sheriff arrived and demanded to see their identification. Britt and Lambert again asserted that they were not trespassing. Insofar as no evidence was presented that they were trespassing, Respondent's actions constituted interference that, if it had been alleged, would violate Section 8(a)(1) of the Act. *Gainesville Mfg. Co.*, 271 NLRB 1186 (1984). Although Respondent had no notice that this evidence was going to be presented, Board precedent is clear that I may not ignore such evidence of animus. *U.S. Rubber Co.*, 93 NLRB 1232, 1233 fn. 2 (1951). I do not conclude that Respondent's failure to litigate this incident establishes anything other than a calculated trial strategy decision since General Counsel represented that this evidence was being introduced only for the purpose of establishing animus. See *Seaward International, Inc.*, 270 NLRB 1034 (1984). General Counsel contends that I erroneously precluded him from presenting additional evidence of animus by restricting his cross-examination of some of Respondent's witnesses regarding Plant Manager Joseph Garrison's speech to employees on July 28, in which he expressed Respondent's desire to remain nonunion. No portion of Garrison's speech is alleged to have violated Section 8(a)(1) of the Act; however, I am mindful that the Board holds that statements reflecting an employer's desire to remain union free may establish animus. See *Gencorp*, 294 NLRB 717 fn. 1 (1989). In this case, Counsel for General Counsel did not seek to establish that Garrison's speech established animus during the presentation of his case. Consistent with Rule 611(b) of the Federal Rules of Evidence, I limited cross-examination to the subject matter of the direct examination of Respondent's witness. There was no need to prolong the hearing by permitting General Counsel to cross-examine witnesses regarding a speech

[2] The name of the Union was amended to reflect Local 470 as the Charging Party.

[3] The Court's opinion eschews the balancing component discussed in the opinion of the Court of Appeals, but it does acknowledge that "there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." Id at fn. 19.

that neither the complaint nor General Counsel's case-in-chief had put in issue.

B. The Detention of Gary McClain

1. Facts

a. Background

Pactiv Corporation is a recently created subsidiary of Tenneco Corporation. The manufacturing facility at Beech Island was formerly operated by Amoco Corporation, and all long-term employees have been employed successively by Amoco, Tenneco, and Pactiv. The employees at the Beech Island facility are not represented by a labor organization. In early 1999, Respondent began planning an operational change that would integrate its maintenance employees into the production work force. This operational change was not greeted with overwhelming enthusiasm by the affected employees, one of whom was McClain.

McClain worked at the Beech Island facility for approximately 18 years. The dates of his positions in the 1980s are not specifically established in the record; however, in 1985 he was a machine operator under Supervisor Joe Powell. McClain informed Powell on several occasions that unknown persons were sabotaging his machine. After several such general accusations, McClain specifically accused a specific fellow employee of sabotaging his machine. Powell investigated and discovered that the employee had been seeking to get the machine to operate properly. When Powell informed McClain of this, McClain became angry and upset that Powell had not terminated the other employee. Powell suggested that McClain seek counseling regarding his anger and it appears that he went to at least one counseling session.

In 1986 or 1987, a consulting firm conducted an employee survey and interviewed employees. The psychologist conducting the interviews informed Human Resources Manager Ron Clark that Respondent should never attempt to fire McClain. Although hearsay with regard to the truth of the matter, this report is contained in General Counsel's Exhibit 5.

McClain became the plant lubricator sometime after 1985 and before 1990, a position he held for at least 10 years prior to July 1999. He worked Monday through Friday, from 7 a.m. until 3 p.m. In 1994, the Company began using him as the plant photographer. In 1996 or 1997, the plant had completed an expansion and the Governor of South Carolina came to the plant for a tour and speech, an event that took 1-1/2 or 2 hours. McClain spoke with the Governor and took photographs of him. There is no evidence that McClain was under any stress or appeared agitated at that time.

McClain owns guns and hunts, an activity engaged in by numerous employees of the Respondent. In the past, he also kept several dogs. In performing his job as plant lubricator, McClain had minimal contact with other employees. He performed this job competently. There is no evidence that McClain ever engaged in physical violence towards any employee. When working as plant lubricator, McClain carried his personal knife, the blade of which folded into the casing, in a pouch on his belt. He used the knife to cut gaskets and hoses in connection with his work. Nothing was ever said to him regarding his use of this knife as the plant lubricator.

b. McClain's Behavior

In February, Plant Human Resources Director Ron Clark alerted Joseph Berley, M.D., Respondent's director of occupational health services, of the upcoming maintenance reorganization and expressed concern about McClain due to his past history of anger with regard to the alleged sabotage of his machine. Dr. Berley, who has responsibility for 55 plants including Beech Island, responded that it did not sound like there was anything that needed to be addressed at that time, but to keep him informed. In April, following the shootings at Columbine High School in Colorado, Clark again called Berley about some alleged comments relating to workplace violence that McClain had attributed to two employees. Clark informed Dr. Berley that the comments McClain attributed to the individuals were inconsistent with the actions and behavior of those persons. They are not identified in the record. Dr. Berley contacted Respondent's director of security, Robin Montgomery, and discussed the situation with him. Montgomery recalled that Dr. Berley noted McClain's anger management issues in the past, "the fact that he [McClain] was now going to be forced to be working with individuals, where in the past he had been working pretty much by himself, and . . . [the need] to go through a recertification process might add stress also." Dr. Berley spoke with Clark again in May.

In February 1999, McClain came to the office of Human Resources Assistant Brenda Taylor. McClain told Taylor that people were coming into his trailer and watching him sleep. He stated that he would wake up and see them out of the corner of his eye. He reported that people were turning his clock back to make him late for work and moving his medicine. He noted that he slept with two loaded guns on either side of his bed. Taylor immediately reported this conversation to Human Resources Manager Ron Clark. There is no evidence that McClain was exhibiting any unusual behavior at the time he made this report to Taylor.

In May, the reorganization was announced. Job assignments pursuant to the reorganization were implemented in early July. McClain was assigned to A Crew and recalls beginning work on this crew on July 10. Training Coordinator Linda Milton assigned Catherine Bing, who had 19 years experience and was the senior operator on A Crew, to train McClain as an operator mechanic on the thermoformer. His new job duties included changing out molds and troubleshooting. McClain understood that the reorganization required that employees be certified to perform their new job responsibilities and that the certification process involved testing. If an employee failed any test three times, the employee would be terminated.

Shortly after the reorganization, employee Rita Wethington asked McClain if he "was maintenance on that [A] crew," and McClain said, "No." Thereafter, Wethington spoke with Milton who confirmed that McClain was on the A Crew. Wethington told Milton that she and McClain were neighbors and that he was "not a very social person." She reported that, when the reorganization was implemented, she had observed McClain wandering around in his yard looking up into the trees. Milton confirmed that Wethington informed her that the day after the reorganization occurred McClain seemed agitated and that she, Wethington, had observed him walking around in his yard "throwing his hands in the air."

All employees being trained had been provided with a manual reference guide to study. Bing experienced problems in training McClain because he wanted her to explain everything

to him. When Bing asked McClain where his book was, he would say it was in his tool box. Bing told McClain that he needed to read the book because what he was asking was in the book. Bing reported her problems with McClain to Milton, stating that "a lot of the questions he had were in the book. He wanted me to tell him what was in the book." Milton reported the foregoing to McClain's supervisor, Doug Boynton, who spoke with McClain during the workweek of July 19. McClain was on the night shift from July 10–13 and again from July 26-29. He was on the day shift early in the workweek of July 19.

When Supervisor Boynton met with him, McClain never appeared to get focused. He appeared agitated and could not sit still. Although Boynton attempted to direct the conversation to the training problems that Milton had reported, McClain kept trying to change the subject, specifically complaining about Supervisor Joe Powell "picking on him" in the past. He complained that, when he had been a machine operator more than 10 years ago, people had sabotaged his machine. McClain related a meeting with Powell at which he stated Powell was sliding his fingers up and down a nail, and he expressed concern that Powell was putting nails in his tires. Boynton observed that McClain became more and more agitated as the meeting progressed and "his behavior really disturbed me."

Employee Danny Mills worked on A Crew. At some point after McClain was assigned to that crew, he commented to Mills that Supervisor Joe Powell, who oversaw the night shift, "had done something to . . . [McClain] in the past." Mills approached Powell and asked if he had ever done anything to McClain. Powell responded that he had not. Mills told him that McClain was saying otherwise and that Powell "might want to watch his back." Powell confirmed that Mills told him to watch his back, "that Gary [McClain] disliked me."

On one evening after the reorganization, McClain came up behind Powell. Powell quickly turned around and McClain asked, "Did I scare you?" and laughed. Powell responded, "Yes." When recounting this incident, Powell testified that McClain "sort of put his finger in my back." McClain denied putting his finger in Powell's back. In the absence of testimony as to how McClain could "sort of" put his finger in Powell's back, I credit McClain's denial.

When working as plant lubricator, McClain had used his personal knife. When McClain began working on A Crew, Bing informed him that he could not use a knife, other than a safety knife, on the production floor. McClain asked her for a safety knife, and she gave him one, instructing him that he should only use the safety knife. McClain was not prohibited from carrying his personal knife, and he continued to do so.

On the afternoon of July 28, Bing called Milton and stated that she needed to speak with her regarding McClain. They spoke together on the morning of July 29. Bing stated that she was concerned about McClain, and related four specific incidents. The first was an accusation by McClain that Powell had, at some point, put nails in his automobile tire. The second related to comments made by McClain after Bing acknowledged that she had given him inaccurate information regarding some paperwork that operators had to fill out. McClain told her that "once he put it in his head that way, that's the way it's going to be" so Bing had "to be careful" about what she told him. The foregoing conversation caused Bing to be concerned that, if McClain did not pass certification, "he would blame me." Bing suggested that "maybe it would be a good idea" for Milton to train him on days. The third was McClain's use of his personal knife, rather than a safety knife, to cut a foam plate in half in order to get a thickness measurement. Bing described this cutting action by raising her arm and bringing it down. She testified that "what really startled me was the sharpness of the knife, . . . it cut right through it [the foam plate]." The final incident reported was a comment by McClain that "people had done him wrong at the plant." Milton corroborated the telephone call and the substance of Bing's report to her the following morning. She recalled that Bing reported that McClain did not like Powell, that McClain said that Powell "had done things to him in the past, as well as other people had, and that they weren't going to get away with it." Milton stated that Bing reported that McClain had stated that certification was made to get him and "it was not going to happen that way." Bing requested that McClain be put on days. Bing stated that she had repeatedly told McClain not to use his knife to perform quality control checks, but that he had done so and it bothered her, it made her nervous. She stated that she was afraid, and referred to Phelon, a plant in Aiken County at which workplace violence had occurred. Milton recalled that Bing stated that McClain had said that he "had a list of people who had . . . done him wrong" over the years, and "they may think he's forgotten about it, but he hadn't." Although Bing did not recall mentioning a list, I credit Milton's testimony that Bing made the foregoing statement to her.

McClain's denial of the physical act of putting a finger in Supervisor Powell's back was the only denial that General Counsel elicited from McClain when he called him in rebuttal after the testimony of Respondent's witnesses. McClain did not deny the conversation with Taylor regarding people watching him as he slept, changing his clock, moving his medicine, and keeping two loaded guns on each side of his bed. He did not deny making the accusation concerning alleged sabotage of his machine when talking to Boynton. He did not deny making accusations against Powell to Boynton, Mills, and Bing. He did not deny coming up behind Powell and, after Powell turned, asking, "Did I scare you" and laughing. Regarding the knife, McClain was asked on direct examination, "Did any supervisor come to you and tell you that you should use a Company knife?" He responded, "No." He did not deny that employee Bing, his trainer, had told him to use only a safety knife. He did not deny telling Bing that "people had done him wrong at the plant."

Angela Lowe, a former employee, and employee Becky Manning regularly took breaks with Milton in the smoking canteen. Lowe expressed to Milton that she was concerned about how McClain was going to react to the reorganization, "because he would get upset about stuff." Milton recalled that Lowe told her that something needed to be done regarding McClain, that Lowe was afraid we would have "another Phelon" if we did not do something. Lowe recalled one occasion upon which Manning commented to Milton that it would be dangerous to sit by Boynton or her, Milton, because, "if Gary [McClain] came in there that they would be the first two that he would take out." Milton recalled Manning stating that she was afraid to sit with Milton, that she might wind up "in the line of fire if Gary were to come after" Milton. Despite this comment, Manning continued to sit and talk with Milton.

In addition to the foregoing first hand accounts, the record contains numerous reports received by supervisors that are hearsay with regard to the truth of the report but are probative in evaluating the motivation for Respondent's actions. Supervi-

sor Powell testified that one night he was talking to employee Brent Williams. They observed McClain walk by. Williams, who is no longer employed by the Respondent, commented, "There goes your next postal worker. I have great concerns that he's capable of going off the deep end and taking some people out." Powell testified that employee Tammy Kirkland stated that she was afraid of McClain's actions at work, that she felt he was capable of doing bodily harm. She did not specify what actions by McClain constituted the basis for her fear. Supervisor Larry Wonoski testified that employee Chris White stated that he was concerned about possible violent or aggressive behavior and related an incident in the past that had upset him when McClain had allegedly shot a dog.

c. Events of July 28 and 29

Union organizational activity began at the Beech Island plant in early July. An employee other than McClain had contacted the Union. That employee is not identified in the record. Respondent learned of union organizational activity on July 12 and, as of July 21, was aware that McClain had become involved. McClain handed out some handbills and began wearing a union cap to work. Nothing was said to him regarding his union activity. No independent 8(a)(1) violations are alleged in the complaint.

On the morning of July 28, prior to the shift that began at 7 a.m., Plant Manager Garrison held a meeting of the crew that was reporting to work, the A Crew. There are approximately 40 to 45 employees in each crew, and all employees on the crew attended this mandatory meeting. Garrison addressed the union organizational activities, stating that Respondent wished to remain union free. In the course of the meeting, McClain interrupted Garrison. Both McClain and Garrison testified to only one interruption. Employee Shon Glover recalled two interruptions, once when Garrison stated that a union authorization card was a binding document and a second time with regard to the amount of union dues. McClain testified that Garrison said something about signing a union card and having to pay dues even if there was no union. He interrupted and said that was not true. In a pretrial affidavit, McClain recalled that he stated that "the only reason for the card was as evidence to take to the NLRB to show that we had enough employees interested to have an election." Garrison said, "Now we know," and asked him not to interrupt any more. Garrison testified that the interruption he recalled occurred when he mentioned the amount of union dues, stating that he did not know the amount of dues. McClain said something, Garrison asked him to repeat what he said, and McClain stated that dues were "half an hour a week." Garrison said, "so roughly two hours a month," and McClain shook his head in agreement. At the conclusion of his remarks Garrison recalls that McClain asked why he did not "let a Union representative come into the plant and talk to the employees like you're talking to the employees." Garrison replied that he did not think that was going to happen, "[t]here's enough of that talk going on." McClain recalled asking why Garrison did not "let a Union representative come in here and speak to all the crews?" He recalls that Garrison responded saying, "We have enough of them in here already." The meeting closed with someone giving a safety tip.

Glover observed that "Gary [McClain] was very agitated, very loud, very rude because we don't ever conduct meetings in that manner." Following the meeting, Glover spoke with Garrison and told him that he should be careful and not take McClain lightly.

McClain was seated in the back row, against the wall of the training room in which the meeting was held. Angela Lowe was sitting in front of McClain. As the meeting progressed, she heard McClain begin to breathe heavily and move his hands around. When speaking out, he spoke loudly. When not speaking out, McClain made comments that Lowe overheard, including, "That's not right," and, "[W]hen I'm done they'll know who I am." There is no evidence that she reported these remarks to any supervisor. Employee Karen Padgett was sitting next to McClain. She observed that he was rubbing both hands on his legs, the top of his thighs. Sweat was running down the side of his face, "[l]ike he was upset." She moved her chair away from him. Supervisor Boynton moved closer to McClain who, at one point, pushed himself up with his arms, as if he were going to stand. Supervisor Wonoski only observed McClain rubbing one of his legs. Although Wonoski did not recall it, Padgett told Wonoski as she was leaving the meeting that she was scared. Wonoski did recall that Padgett stopped him in the hallway the following morning and stated that she was frightened, that in the meeting McClain's leg was shaking, he was rubbing his hand on his thigh, and, as the meeting progressed, "the harder he would rub his leg." She commented that she noticed the knife he was wearing and was concerned that he was going to grab it and jump up. Padgett told Wonoski that she thought about moving but was afraid to move, she was "just like frozen." Wonoski also recalled that employee Johnny Partin approached him after the meeting, mentioned McClain's behavior in the meeting, and stated that he was "frightened, scared." Wonoski had "never previously received reports that employees were scared of another employee."

In July, the union organizational activity at the Beech Island plant was reported to Respondent's corporate headquarter in Lake Forest, New York. Dr. Berley learned of it and was concerned because, from a medical standpoint, organizational activity "can be a very stressful situation to be involved in. It can have a significant effect on an individual." On July 21, Dr. Berley learned that McClain was involved in the union organizational activity. In a telephone call on July 27, Dr. Berley received reports that some employees had expressed concerns regarding McClain's behavior, that they were uncomfortable being around him. A conference call was scheduled for August 3. On July 28, following the concerns expressed as a result of McClain's behavior in the captive audience meeting that morning, the conference call was rescheduled for the morning of July 29.

The conference call on the morning of July 29, included Dr. Berley, Montgomery, Respondent's Director of Human Relations Joe O'Leary, other corporate officials and, at the Beech Island facility, Garrison, Milton, Boynton, Wonoski, and Clark. Garrison summarized the concerns of local management based on employees' statements. It was noted that McClain had become agitated and appeared angry at the captive audience meeting. Boynton described his interaction with McClain at their meeting during the week of July 19, and McClain's behavior at the captive audience meeting, noting that his behavior "seemed to be escalating." Milton reported her conversation with Bing. Montgomery specifically recalled that a list was mentioned, an incident with a knife, and "a general fear" as a result of McClain's anger being displayed at the facility. Montgomery also recalled someone relating an incident regarding firearms

discharge or that Gary was preoccupied with firearms and that he had shot a dog and buried it. There were no decisions or discussions regarding any personnel actions relating to McClain. Dr. Berley stated that he would contact McClain's physician and Montgomery said that he would contact the Sheriff of Aiken County.

Montgomery is a former FBI agent. He explained that he wanted "to put them [the sheriff's office] on notice given what was told to me over the phone." He was aware of the workplace violence incident at the Phelon plant and felt that this was something that that the sheriff's office probably should be aware of. He noted that this action was not unusual, and recounted four other instances since April 1997 in which he had taken similar action. Montgomery did not take notes or question the individuals making reports in the conference call regarding details. When asked whether he conducted the conference call with the precision of an investigating FBI agent, Montgomery responded, "I didn't conduct an investigation." As he later explained, he was "listening to what people were saying," and, admittedly without further investigation, he provided that information to the sheriff's office.

Montgomery called the Sheriff of Aiken County who, like Montgomery, is a former FBI agent. The Sheriff suggested getting two of his deputies on the call, including his Chief Deputy, Major Jody Rowland, and a second call ensued. Montgomery stated that he had been on a conference call regarding the Beech Island plant and that "there was a great concern for the safety of the facility from a Gary McClain, that weapons had been mentioned, firearms had been seen at his residence, and "he had used a knife that had frightened a female employee." He mentioned the list referred to by Milton. Montgomery advised that additional information could be provided by contacting Human Resources Manager Clark at the plant.

Major Jody Rowland, the only law enforcement officer to testify in this proceeding, recalled the substance of the foregoing comments. According to Major Rowland, "The gist of the conversation . . . was that the employees had approached management and basically told them that they had to do something with Gary McClain." The record reflects the facts related in Montgomery's report. McClain's report to Taylor confirms that weapons were mentioned by McClain at the plant and, insofar as he slept with two loaded guns, they certainly would be visible at his residence. Bing's eyewitness account establishes McClain's use of his personal knife to perform a quality control check, an act that was contrary to the instructions she had given him and that frightened her. Milton credibly testified that Bing had reported to her that McClain had a list, and Montgomery heard about this in the conference call.

Major Rowland spoke with Clark after speaking with Montgomery, and he acknowledged that the conversations "kind of melt together." I find that Major Rowland's melding to these two conversations accounts for his attributing comments to Montgomery relating to McClain violating several rules, carrying a personal knife in violation of company policy, and publicly sharpening the knife. Although no employee testified regarding McClain publicly sharpening his knife, Milton confirmed that she had received such a report and had informed Clark of this. Major Rowland failed to distinguish between the carrying of a knife, which did not contravene policy, and Montgomery's report of the use of a knife in violation of company policy.

The record does not establish who initiated the telephone call in which Major Rowland spoke with Clark. Clark mentioned a meeting that, according to Major Rowland's recollection, was described as a "personnel action." Although Major Rowland testified that Montgomery had also mentioned a "a personnel meeting" for which additional security was sought, "if our meeting goes bad[ly]," he thereafter referred to the meeting as a "counseling session." Montgomery did not mention any such meeting. Major Rowland acknowledged that he took no notes. As he credibly explained, "This is a simple call for security, in the beginning. There's no reason for me to make all these notes. This thing stated out as simple as helping an old woman cross the street." Although Major Rowland at one point mentioned termination, since there had been no discussion relating to any action relating to McClain, this had to be an assumption by Major Rowland from the "if our meeting goes bad[ly]" comment. Major Rowland recalled Clark mentioning McClain carrying weapons, having guns and shooting them frequently, and keeping dogs. Regardless of what Clark may have said, his comments had no bearing upon Major Rowland's actions. Major Rowland credibly explained, "[T]here was a security problem and that's where we were going to act. Their problem with knives and whatever else was, I felt, a Company problem that I had no concern with." Although Major Rowland incorrectly interpreted the reference to a counseling session as a personnel action, he correctly understood that the sheriff's office was being asked to provide extra security.

Dr. Berley called the office of McClain's internist and was given the name and number of Dr. David Steiner, a psychiatrist. Dr. Steiner was with a patient. He later returned Dr. Berley's call. Dr. Berley explained who he was and "[t]hat there was a situation that was developing at the plant that was of some concern to me." He noted that he was aware that McClain had some prior anger management control issues and expressed that he was concerned about McClain's response to the reorganization and certification process. He noted that McClain had become involved in union organizing activity at the plant, that employees were reporting behavior that they perceived as being intimidating, and that managers were reporting behavior that was being perceived as threatening. Following this explanation by Dr. Berley, Dr. Steiner responded to his report, and Dr. Berley reported the information he had received from Dr. Steiner in a subsequent conference call. At that time he advised that Montgomery should have the sheriff's office contact Dr. Steiner. Montgomery called and spoke with Major Rowland. He informed him that he might want to talk to Dr. Steiner in order to "better assess the situation."

Major Rowland testified that he personally spoke with Dr. Steiner on July 29. Dr. Steiner informed Major Rowland that McClain was "a ticking time bomb." The foregoing uncontradicted testimony reveals neither a confidential communication nor a diagnosis. Rather, it is a functional evaluation. I do not accept Major Rowland's testimony for the truth of the report that he received from Dr. Steiner, but I do accept it as establishing that he received a report from Dr. Steiner. *Midland Hilton & Towers*, 324 NLRB 1141 fn. 1 (1997).[4]

[4] I sustained General Counsel's hearsay objection with regard to accepting the testimony for the truth of the representation, but, at the time, stated that I was accepting the testimony as to the fact of the receipt of a report that, arguably, could explain the action taken by the sheriff's office.

Dr. Steiner claimed that he did not discuss anything about McClain with Dr. Berley. He testified that he "made it clear" that he could not acknowledge whether he knew or had treated McClain. He testified that Dr. Berley asked how to proceed and that he responded that, "if they felt the behavior was based on mental illness, they could ask McClain to submit to a psychiatric evaluation." Dr. Berley credibly denied that Dr. Steiner stated that he could not discuss McClain. When asked whether he asked Dr. Steiner for advice, Dr. Berley testified, "I don't believe that I ever asked him for advice. I reported to him the situation that had been reported to me." When asked whether Dr. Steiner responded to that report, Dr Berley replied, "He did." General Counsel questioned Dr. Steiner regarding his conversation with Dr. Berley. He did not ask him about a conversation with Major Rowland. General Counsel did not recall Dr. Steiner after Major Rowland testified to the report that he received from Dr. Steiner. The testimony that Major Rowland received a report from Dr. Steiner is uncontradicted. I credit Dr. Berley. Dr. Berley's receipt of a response from Dr. Steiner is consistent with his advising Montgomery to give Dr. Steiner's name to the sheriff's office. It is also consistent with the testimony of Major Rowland that he spoke with Dr. Steiner and that Dr. Steiner made a report to him.

During the day on July 29, someone in the sheriff's office informed Montgomery that it had discovered an outstanding warrant for the arrest of McClain for the discharge of a firearm. The warrant was 4 years old. Major Rowland categorically denied that either Montgomery or Clark requested that the sheriff's office take any action other than provide additional security at the plant. Major Rowland explained, "We were going to meet there [at the plant] at a certain time in the afternoon, however, . . . as we were checking our system to gain information on Gary McClain, we found an outstanding warrant on Mr. McClain." With the warrant in hand, Major Rowland and other deputies intercepted McClain on his way to work. Major Rowland explained, "That was our doing, not Tenneco's doing."

When McClain was driving to work, he saw blue lights and began slowing down. Two patrol cars passed him and began slowing down. McClain testified that two or more cars pulled up beside him and that there were two behind him. The deputies ordered him to get out of his truck and keep his hands visible. McClain was frisked, handcuffed, and put in a patrol car. He heard a statement on the police radio, "We've got that Tenneco package." Major Rowland was not asked about the number of deputies involved in McClain's detention.

McClain was transported to the Aiken Barnwell Mental Health Facility. The physician on duty, Dr. James, who is not otherwise identified in the record, stated to Major Rowland that McClain was "a ticking time bomb."[5] There is no evidence that Major Rowland advised Dr. James of anything. Contrary to General Counsel's brief, there is not a scintilla of evidence that sheriff's deputies or anyone else informed Dr. James that McClain had been "brandishing guns and knives." Nor is there support for his assertion that Dr. James was "a harried emergency room medical doctor." Whether Dr. James was "harried" or whether he is also a psychiatrist is not reflected in the record. General Counsel objected to all expert medical testimony regarding McClain's mental condition. Thus, the only probative evidence before me is that Dr. James signed an emergency involuntary commitment pursuant to which deputies transported McClain to the Charter Rivers Behavioral Health Systems facility located in Lee County, South Carolina. Major Rowland credibly denied that any representative of Tenneco was involved in any action relating to the involuntary commitment of McClain.

[5] When asked on cross-examination whether McClain was ever described as "a ticking time bomb," Major Rowland answered, "Actually that description was used to me twice that day. Once from Dr. Steiner and once from the emergency room doctor."

2. Analysis and concluding findings

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that McClain engaged in union activity and that Respondent was aware of his union activity. I find, as discussed above, that General Counsel has established that Respondent bore animus towards union organizational activity.

The issue in this case is whether Respondent's animus was a substantial and motivating factor with regard to the actions it took. I find it was not. The record establishes that a total of at least 11 employees, 6 of whom testified in this proceeding, had made comments reflecting concerns about McClain's behavior. McClain himself had reported sleeping with two loaded guns on either side of his bed to Human Resources Assistant Taylor. Supervisors Powell and Boynton had observed behavior that they found disturbing. McClain's agitation at the captive audience meeting was observed by Boynton and Wonoski. Karen Padgett, who was sitting next to him, was frightened by his behavior and expressed concern to Wonoski. Shon Glover was sufficiently concerned that he told Plant Manger Garrison not to take McClain lightly. Wonoski had "never previously received reports that employees were scared of another employee."

In cases involving action by law enforcement authorities, the threshold question is whether the contact was motivated by antiunion considerations. Such motivation was found in *Sure-Tan*, 234 NLRB 1187 (1978), in which the respondent therein contacted the Immigration and Naturalization Service (INS) regarding employees that it knew were illegally in the United States and in *Impact Industries*, 285 NLRB 5 (1987), in which the administrative law judge found that, in contacting the INS, the respondent "was taking action *intended* to cause the separation of the prounion" employees. Id. at 28, fn. 38. (Emphasis in the original.) I find no basis for concluding that scheduling a conference call with Respondent's Director of Occupational Health Services and Director of Security following the reports and observations of McClain's behavior was motivated by McClain's union activity. It might well be true, as argued by General Counsel, that there was "paranoia" with regard to the Phelon incident. The employees' and managers' sensitivity to the possibility of workplace violence as a result to their knowledge of the Phelon incident was not shown to be connected to union activity at the Beech Island plant or McClain's involvement in that activity. There is no evidence that any personnel decision relating to McClain was made in the conference call. Montgomery made no notes and did not question the individuals making reports because the conference call was not an investigation. It was a round table discussion in which management officials of Respondent were seeking to obtain all of the information they could in order to determine how to handle a situation about which they were justifiably concerned. Consistent with this, Dr. Berley was to contact McClain's psychiatrist and Montgomery was to contact the Sheriff of Aiken County. There is no probative evidence that these actions were moti-

vated by animus towards McClain's involvement with the Union.

General Counsel and the Charging Party argue that Respondent contacted the sheriff's office with the intent of having law enforcement officials remove McClain from the work force and accomplished this by reporting exaggerated hearsay anecdotes of McClain's behavior. Contrary to this argument, McClain's self report to Taylor of sleeping with two loaded guns, Bing's reaction to his use of a knife she had asked him not to use, and record testimony by five other employees reflecting concern about McClain's behavior are not hearsay. Major Rowland considered the "gist" of the reports to be that "employees had approached management and basically told them that they had to do something with Gary McClain." Regardless of what reports were made regarding guns, knives, and dogs, Major Rowland credibly testified that the "knives and whatever else was . . . a Company problem that I had no concern with." No representative of Respondent requested that the sheriff's office take any action other than provide additional security. The reports to Major Rowland did not accuse McClain of any crime. Unlike the cases cited in the briefs of General Counsel and the Charging Party in which warrants were sworn out or the illegal status of alien employees assured their deportation, the Respondent herein neither requested that any action be taken against McClain nor provided the Sheriff with information upon which action could be taken. As a result of Respondent's request, the deputies were going to the plant at a prearranged time to provide security for what Major Rowland understood was a personnel action. This changed not as a result of communication with Respondent but after the outstanding warrant came to Major Rowland's attention. As he explained, regarding the detention of McClain, "That was our doing, not Tenneco's doing."

Major Rowland received a report from Dr. Steiner. He made the decision to take McClain to the Aiken Barnwell Mental Health Center. No representative of Respondent requested that Major Rowland do so. Dr. Berley had suggested that Montgomery give Dr. Steiner's name to the sheriff's office presumably because he was aware of the information Dr. Steiner would impart. Dr. Steiner told Major Rowland that McClain was "a ticking time bomb." There is no evidence that Dr. Berley's suggestion that the sheriff's office contact Dr. Steiner was motivated by antiunion animus. Even if I were to find that union considerations played some part in Dr. Berley's actions, I would further find that he would have taken the same action under any circumstances because of safety concerns.

I find that General Counsel has not established that Respondent's animus towards employee union activity was the motivation for its actions. Even if I were to have found illegal motivation, I would further find that Respondent would have taken the same action under similar circumstances regardless of any union considerations. The record does not establish that Respondent requested that any action be taken regarding McClain. Major Rowland understood that Respondent was requesting additional security. His testimony establishes that the detention of McClain resulted from the happenstance of an unserved warrant. The detention was an independent action taken by the sheriff's office; it was "not Tenneco's doing." I shall recommend that the allegation that Respondent contacted the sheriff's office and unlawfully caused the detention of McClain be dismissed.

C. The Failure to Return McClain to Work Unconditionally

1. Facts

On August 11, more than 10 days after being involuntarily committed, McClain appeared before Judge C. F. Harris in the Probate Court of Lee County. He was represented by counsel. Following a hearing, Judge Harris entered an order finding, inter alia, that McClain was mentally ill and that, because of his condition, there was "a likelihood of serious harm to himself or others." Judge Harris ordered that McClain undergo outpatient treatment. Counsel for General Counsel, in his brief, asserts that I should give no weight to the foregoing order because "lies [about McClain] poisoned the well of information upon which [Judge Harris] based her order." Contrary to General Counsel, there is absolutely no evidence in this record establishing whether the order of Judge Harris was based on lies or expert medical testimony from observation and treatment of McClain for more than 10 days at the Charter Rivers facility. General Counsel, counsel for the Charging Party, and McClain's private attorney all objected to Respondent's attempt to present testimony from the medical personnel who evaluated McClain, and General Counsel petitioned to revoke Respondent's subpoenas of the medical files relating to his commitment. Thus, there is no evidence on this record establishing what findings were made or the basis for those findings. Counsel for General Counsel cannot have it both ways. If he wished me to find that the order of Judge Harris was unwarranted, he needed to place the record made before Judge Harris before me and adduce probative evidence establishing the falsity of the information upon which she based her findings. He did not do so. The only probative evidence before me is that, as of August 11, McClain was found to be mentally ill and ordered to undergo outpatient treatment.

On August 18, Respondent's attorney wrote McClain's attorney. The letter refers to a previous discussion between them, notes that Respondent is reviewing a medical evaluation that was provided by McClain's attorney but which no party offered as evidence, and states that, prior to returning McClain to work, Respondent "may wish to conduct an independent evaluation of Mr. McClain's medical condition."

On January 4, 2000, McClain's treating physician, Dr. Gregory Hamilton, Medical Director of the Aiken Barnwell Mental Health Center, wrote the Judge of the Probate Court. The letter does not address McClain's mental state between August 11 and January 4. It states that McClain is "not now in need of further court ordered outpatient treatment." The letter further notes that, "because of ongoing stresses," McClain may want to continue voluntary treatment.

> Respondent has a short term disability policy that provides, in part, as follows:
>
> Associates should be returned to work through the Tenneco Packaging, Specialty Products medical designee after a disability of five or more working days absent and present proof of illness from associate's personal physician prior to release to return to work.

The policy reflects that it was issued on November 2, 1998. It was adhered to without exception in 1999. Human Resources Assistant Taylor testified that the policy was received at the plant on November 7, 1998. She credibly explained that the only two instances in which an employee returned to work without being released by the company doctor were oversights.

The first occurred in November when the employee had gone out on November 5, prior to the plant's receipt of the policy on November 7, 1998, and the other in December when the employee returned to work during the Christmas holiday period. Documentary evidence confirms that, in 1999, every employee who returned to work had an authorization to return to work from Respondent's physician.

2. Analysis and concluding findings

The amended consolidated complaint alleges that Respondent discriminatorily failed to reinstate McClain "since on or about July 29." A separate allegation pleads that Respondent, "since August 18," has discriminatorily conditioned his reinstatement upon undergoing "an examination by a psychiatrist of Respondent's choosing."[6] I have found no unlawful discrimination by Respondent with regard to the events resulting in the detention of McClain by the sheriff's office, thus I find no unlawful failure to reinstate him as of July 29. Even if I were to have found that Respondent's act of contacting the Sheriff on July 29 was motivated by its desire to cause McClain's detention and removal from the work force because of his union activity, General Counsel adduced no evidence establishing any connection between that act and the independent action of commitment taken by Dr. James, the physician on duty at the Aiken Barnwell Mental Health Center. The only evidence before me relating to McClain's mental condition on the evening of July 29 is the factual evidence that the doctor, whether a medical doctor or psychiatrist, who encountered McClain after his detention determined that he should be involuntarily committed. Thereafter, McClain was at Charter Rivers until August 11.

On August 11, McClain was found to be mentally ill and ordered to undergo outpatient treatment. On January 4, 2000, Dr. Hamilton wrote that McClain is "not now in need of further court ordered outpatient treatment." Although Respondent did not have a copy of the Order of the Probate Court, a letter signed by Dr. Berley on September 13, establishes that Respondent was aware that McClain had been committed and had been ordered to undergo outpatient treatment. From August 11, until January 4, there is no evidence before me relating to McClain's mental condition and no document releasing him to return to work. On August 18, Respondent's attorney communicated with McClain's attorney. The correspondence refers to a medical evaluation sent by McClain's attorney; however, there is no evidence that the report, which was not offered into evidence, released McClain to return to work. Dr. Hamilton's letter of January 4, 2000, states that McClain was not in need of further court ordered treatment, but it goes on to state that "because of ongoing stresses," which were not specified, McClain might want to continue voluntary treatment. The letter does not state that McClain is fit to return to work in an industrial setting; it states only that he is no longer in need of "court ordered treatment."

[6] The complaint does not allege that Respondent's commitment to maintain the confidentiality of the psychiatrist's report, disclosing it to managers and supervisors only on a "need to know" basis, violated the Act. Although General Counsel and Charging Party have both addressed this issue in their briefs, it is not before me. I note that the Americas with Disabilities Act, 42 U.S.C. Sec. 12112(d)(3)(B) permits the disclosure of otherwise confidential information in order to assure that necessary accommodations are made for employees.

Respondent's short term disability policy provides that employees are returned to work through Respondent's "medical designee after a disability of five or more working days absent." Charging Party asserts that Respondent's reliance on its short term disability policy must be rejected because Respondent's attorney, in his correspondence with McClain's attorney on August 18, made no reference to the policy. The letter stated that, after reviewing the medical evaluation report which is not in evidence, Respondent "may wish to conduct an independent evaluation " of McClain. Contrary to the Charging Party, I perceive no basis for finding that Respondent's attorney's failure to mention the policy in his correspondence with another attorney establishes that the policy was "seized upon" as a "pretext" in order to "retaliate against Mr. McClain for his union activity." Documentary and testimonial evidence establishes that, with the exception of the two explained oversights, Respondent has consistently adhered to its policy since it was instituted in November 1998. No deviation from it occurred in 1999.

Respondent's insistence that McClain be examined by a psychiatrist of its choosing is consistent with its preexisting policy regarding any employee who has missed more than 5 days of work. There is no evidence that this policy was applied to McClain discriminatorily. Even if unlawful motivation be assumed, Respondent has sustained its burden under *Wright Line* and has established that all employees who miss five or more days of work are returned to work through Respondent's medical designee. In view of the foregoing, I shall recommend that the allegation that Respondent discriminatorily conditioned McClain's reinstatement upon his undergoing an examination by a psychiatrist of Respondent's choosing be dismissed.

CONCLUSIONS OF LAW

Respondent has not engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 9, 2000

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.